Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BETTY AND GARY LOSSON - PETITIONERS

VS.

GWENDOLYN KLEIN LOSSON - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the failure of the District Court to allow Petitioners a hearing on their issues deny Petitioners due process of law as set forth in the Fifth Amendment to the U.S. Constitution?

2. Does the District Court's finding that Petitioner's had no viable position deny Petitioners due process of law under the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

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No. _____

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OCTOBER TERM, 1994

GARY AND BETTY LOSSON - PETITIONERS

VS.

GWENDOLYN KLEIN LOSSON - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioners, Gary and Betty Losson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Prudential Insurance v. Gary Lynn Losson; Betty Jane Losson; Gwendolyn Klein Losson; and Bari Lynne Losson, Memorandum Decision No. 93-36131 and appears in Appendix A to this Petition.

JURISDICTION

The Court of Appeals' Opinion in the matter was filed on January 13, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix B. This case also involves Rule 60(b) of the Federal Rules of Civil Procedure, 38 Code of Federal Regulations, Section 9.16(b), and, 38 United States Code, Section 1968.

STATEMENT OF THE CASE

By Order dated September 27, 1993 the district court granted Gwendolyn Klein Losson's motion for summary judgment. Thereafter, on September 28, 1993, appellants Gary and Betty Losson filed a motion with the district court to set aside the Order granting summary judgment. By order dated November 23, 1993 the district court denied appellant's motion to set aside the summary judgment. This appeal was filed November 29, 1993, within the ten (10) day period of Rule 4(b) of the Federal Rules of Appellate Procedure. Had the district court granted Betty and Gary Losson's motion to set aside, as it should have, there would have been no appeal. Until the district court ruled on the motion to set aside there was no final, appealable issue.

PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

On November 17, 1992 the original plaintiff, The Prudential Insurance Company of America ("Prudential") commenced this action by filing a Complaint for Interpleader pursuant to 28 U.S.C. §§1335, 1397, and 2361.

After having been given leave by the district court Prudential deposited the proceeds of the life insurance policy ($54,190.00) with the court on December 14, 1992.

On January 19, 1993 Bari Losson filed her answer to Prudential's complaint for interpleader.

On February 12, 1993 Gary and Betty Losson filed their answer to Prudential's complaint for interpleader.

On February 25, 1993 Gwendolyn Klein Losson filed her answer to Prudential's complaint for interpleader.

By Order dated April 12, 1993 the district court gave Prudential until April 30, 1993 to file its motion for summary judgment and further ordered that all other motions for summary judgment be filed on or before August 16, 1993. The Order also set a hearing on the motions for December 3, 1993 at 9:00 a.m.

On May 11, 1993 the district court granted Prudential's motion for summary judgment discharging them as a stakeholder in the action, leaving three parties claiming the proceeds: Gary and Betty Losson, Gwendolyn Klein Losson and Bari Losson.

Upon motion of Gwendolyn Klein Losson the district court subsequently modified its scheduling order and vacated the August 16, 1993 deadline for summary judgment motions and gave the parties until October 15, 1993 to file their respective motions for summary judgment. (The December 3rd hearing date was not altered).

On September 1, 1993 Gwendolyn Klein Losson filed her motion for summary judgment.

On September 27, 1993 the district court granted Gwendolyn Klein Losson's motion for summary judgment.

On September 28, 1993 Gary and Betty Losson filed their motion to set aside the district court's order granting Gwendolyn Klein Losson's motion for summary judgment.

On October 4, 1993 Bari Losson's attorney Art Thompson filed his affidavit with the district court stating that he, too, was under the impression, because of the court's scheduling orders, that all parties had until October 15, 1993 to file their motions for summary judgment. Thompson, also notified the court that his client was throwing in the towel and was not any longer claiming any interest in the life insurance proceeds.

On October 15, 1993 Gary and Betty Losson filed their motion for summary judgment with the district court.

On November 23, 1993 the district court entered its Order denying Gary and Betty Losson's motion to set aside the Order granting summary judgment to Gwendolyn Klein Losson.

Gary and Betty Losson filed this appeal of the district court's decisions on November 29, 1993.

STATEMENT OF FACTS

Richard Losson and Gwendolyn Klein were married in December 24, 1984. On March 12, 1985 Richard enlisted in the U.S. Navy's delayed entry program and on October 1, 1985 he went on active duty. During that time he designated his parents, Gary and Betty Losson, as the beneficiaries of his life insurance policy. On May 6, 1989 Richard married Gwendolyn Klein in Las Vegas, Nevada. On May 8, 1989 Richard designated his new wife as his life insurance principal beneficiary and his parents as his contingent beneficiaries. On September 30, 1989 Richard was given an honorable discharge from active duty and was transferred to the naval reserve (where he was to remain until March 11, 1993). Richard subsequently divorced Gwendolyn Klein. One year and 42 days later, November 11, 1990, Richard joined the active naval reserves. Richard was murdered by his second wife (common law) Bari Losson on March 13, 1991 in Billings, Montana.

At the time of his death Richard's life was insured by Servicemen's Group Life Insurance (SGLI) which was established pursuant to Title 38, United States Code, Ch. 19, Subch.III, as amended. The death benefit payable under the policy is $50,000.00. That sum, plus accrued interest, less fees and costs incurred by Prudential, has been paid into the district court and is being held pending outcome of this matter.

Gwendolyn Klein Losson filed her motion for summary judgment arguing that, at the time of his death, Richard Losson was covered by SGLI, which is undisputed. She further argued that in 1989 Richard designated her, as his wife, his sole beneficiary, which is also undisputed. The issue before the district court was whether that designation of beneficiary was in effect at the time of Richard's death. If it was then Gwendolyn (the ex-wife) is entitled to the proceeds. If it was not, then Gary and Betty Losson (Richard's parents) are entitled, as a matter of law (Richard left no children), to the proceeds. This much is undisputed.

Gwendolyn's argument was that under 38 C.F.R. §9.16(b) Richard's designation of beneficiary was never cancelled and therefore she is entitled to the proceeds of the SGLI policy. That regulation reads as follows:

38 C.F.R. §9.16(b) - Any designation of beneficiary or election of optional settlement made by any member insured under Servicemen's Group Life Insurance for full time coverage or part-time coverage will remain in effect, until properly changed by the member or automatically canceled, under the following rules:

(1) If the insurance terminates following separation or release from all duty in a uniformed service.

(2) If the member enters on duty in another uniformed service.

(3) If the member reenters on duty in the same uniformed service more than 1 calendar day after separation or release from all duty in that uniformed service.

Gwendolyn's argument continued that none of the three options listed were applicable. As to paragraph (1) she asserted that Richard was not separated or released from all duty in a uniformed service because after his discharge from active duty he was still obligated to the naval reserves until March 11, 1993. As to paragraph (2) she asserted that Richard never entered on duty with another uniformed service. As to paragraph (3) she argued that Richard was never separated or released from all duty in the Navy.

Furthermore, Gwendolyn argued that Richard never changed his designation of beneficiary. There is no contest in this regard. Richard did not formally change the beneficiary on his SGLI policy as required by the regulations.

Based upon the foregoing the district court granted, prematurely, Gwendolyn's motion for summary judgment, thereby awarding her the proceeds of the insurance policy. Richard's common law wife at the time of his death, Bari Losson, was convicted of his murder, and therefore, bowed out of contention for the proceeds.

After the district court breached its own scheduling order (arguing that its order was of no effect because of the 10 day rule found in Local Rule 220-1 which requires responses to motions within 10 days) Gary and Betty Losson moved to set aside the Order granting summary judgment and filing their own motion for summary judgment citing 38 U.S.C. §1968 which clearly indicates that, by law, Richard's policy coverage terminated one hundred and twenty (120) days after his separation from active duty. That termination voided all designations of beneficiaries. When Richard signed up for the active reserves his coverage was reinstated, no beneficiaries were designated, and therefore, at the time of his death, Gary and Betty Losson were entitled to the proceeds of his policy.

REASONS FOR GRANTING THE WRIT

STANDARD OF REVIEW

With regard to Gary and Betty Losson's motion under Federal Rules of Civil Procedure 60(b) to set aside the Order granting summary judgment to Gwendolyn Klein Losson the standard of review is abuse of discretion. Richmark Corp. v. Timber Falling Consultants, Inc., 937 F.2d 1444 (9th Cir. 1991).

The appellate court must review a district court's action on a motion for summary judgment in a manner most favorable to the losing party. Arnsberg v. United States, 757 F2d 971, cert den 89 L.Ed.2d 300, 106 S.Ct. 1183 (9th Cir. 1985). "The court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." Erickson v. Pierce County, 960 F.2d 801 (9th Cir. 1992) citing Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989). Court of appeals reviews grant of summary judgment by district court de novo. Ek v. Herrington, 939 F.2d 839 (9th Cir. 1991).

ARGUMENT

It was clearly an abuse of discretion for the district court to deny Gary and Betty Losson's Rule 60(b) motion to set aside the Order granting Gwendolyn Klein Losson's motion for summary judgment, which amounted to a denial of due process under the law as guaranteed by the 5th Amendment to the Constitution. There are two reasons for this: first, the district court sabotaged appellants position by undercutting its own scheduling order, and second, by ignoring the clear language in 38 U.S.C. §1968 as set forth in Gary and Betty Losson's motion for summary judgment the district court turned its back on a clearly viable issue.

SCHEDULING ORDER

The complaint in interpleader was filed November 17, 1992. A preliminary pre-trial conference was held April 9, 1993 and thereafter the district court issued an order setting a deadline for motions for summary judgment for August 16, 1993 and a hearing on the motions for December 3, 1993. On August 13, 1993 Gwendolyn Klein Losson moved the court for an extension of time within which to file motions for summary judgment, which was joined by Betty and Gary Losson on August 16, 1993. On August 18, 1993 the district court entered its Order extending the deadline for filing summary judgment motions from August 16, 1993 to October 15, 1993. The date for hearing on the motions remained December 3, 1993.

Gwendolyn Klein Losson filed her motion for summary judgment on September 1, 1993. On September 27, 1993 the district court granted her motion for summary judgment. In its Order the court stated:

"No response has been filed by the opposing parties within the ten day time period prescribed by Local Rule 220-1. 'Failure to file briefs within the prescribed time may subject any motion to summary ruling . . . and, failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.' Local Rule 220-1."

In light of the district court's scheduling orders this ruling is a blatant abuse of discretion. First the district court clearly gave all parties until October 15, 1993 to file their respective motions for summary judgment. Furthermore, the district court set December 3, 1993 as the date for hearing on the motions. It was incredibly reasonable for the parties to believe, based on the scheduling orders, that not only did they have until October 15, 1993 to file motions for summary judgment, but that they also were going to have opportunity to argue their positions in open court on the hearing date, December 3, 1993. The court made its scheduling order and the parties were entitled to rely on it.

Then, out of the blue, on September 27, 1993 the district court grants Gwendolyn Klein Losson's motion for summary judgment, ignoring its own calendar, and invoking the 10 day rule of the local rules.

The district court's position is untenable. To call this action an abuse of discretion is sugar coating. If the district court were to be allowed to make Orders, file them with the court, serve them on the parties, and then throw all of that out, along with the expectations of the parties, because of a technicality in a local rule, is absurd. All local counsel would have to start second guessing the district court's orders asking whether the court was going to honor its own orders or whether there was some other order hidden somewhere that would render those orders null and void. Parties, at a minimum, ought to be entitled to rely on the orders of the court. What would happen for instance, in a criminal case, under the 70 day speedy trial rule, if the court were to issue an order setting trial for a date 85 days beyond the 70 day limit and then dismiss the cause because the parties weren't in court, ready for trial, on the 70th day? That would be preposterous. So is the action taken by the district court in this case.

SUMMARY JUDGMENT

At best, the district court should have granted Gary and Betty Losson's motion for summary judgment. At least, it should have denied Gwendolyn Losson's motion for summary judgment.

In its order of September 27, 1993 the district court stated that "38 C.F.R. §9.16(b) governs how a beneficiary may be changed under the policy. Applying these relevant code sections to the undisputed facts in this case clearly indicates that Defendant is entitled to the life insurance proceeds." What the district court failed to realize, or even address, is that under the language of 38 U.S.C. §1968 the policy clearly terminated before Richard's reactivation, which thereby terminated the designation of beneficiary.

38 U.S.C. §1968 reads as follows:

> (a) Each policy purchased under this subchapter shall contain a provision, in terms approved by the Secretary, to the effect that any insurance thereunder on any member of the uniformed services, unless discontinued or reduced upon the written request of the insured, shall continue in effect while the member is on active duty, active duty for training, or inactive duty training scheduled in advance by competent authority during the period thereof, or while the member meets the qualifications set forth in section 1965(5)(B) or (C) of this title, and **such insurance shall cease --**

> (1) with respect to a member on active duty or active duty for training under a call or order to duty that does not specify a period of less than thirty-one days --
>
> > (A) one hundred and twenty days after the separation or release from active duty or active duty for training, unless on the date of such separation or release the member is totally disabled, under criteria established by the Secre tary, in which event the insurance shall cease one year after the date of separation or release from such active duty or active duty for training, or on the date the insured ceases to be totally disabled, whichever is the earlier date, but in no event prior to the expiration of one hundred and twenty days after such separation or release; ... (emphasis added).

It is abundantly clear from a plain reading of §1968 that Richard's SGLI insurance ceased 120 days after his release from active duty. He was released from active duty September 30, 1989. One hundred twenty days later, approximately January 29, 1990, his SGLI insurance ceased. Therefore the insurance was terminated and, along with it, all designations of beneficiaries. The district court should have understood that fact, and therefore denied Gwendolyn Klein's Losson's motion for summary judgment. Failure to do so was clear and blatant abuse of discretion.

In ruling on a motion for summary judgment, the district court must view the evidence and draw all inferences in a light most favorable to the nonmoving party. T.W. Electrical Services, Inc. v. Pacific Electrical Contractors, 809 F.2d 626, 630-31 (9th Cir. 1987). At a minimum, the district court had before it substantive law that, when viewed in a light most favorable to Gary and Betty Losson, would have been grounds for denial of Gwendolyn Klein Losson's motion for summary judgment. That's at a minimum. Rationally, and legally, the district court should have granted summary judgment to Gary and Betty Losson. When the district court was put on notice that Gary and Betty Losson were opposing Gwendolyn's motion for summary judgment, and had their own motion, it should have adhered to its own scheduling order and had a hearing on December 3, 1993 at which time the parties could have argued their respective positions.

Had it done so, the district court would have heard evidence that not only had the SGLI policy expired under the plain language of 38 U.S.C. §1968 but also that the policy itself, by its own terms, terminated between the time Richard Losson left active duty and the time he reentered active reserve duty, thereby cancelling the designation of beneficiary.

The district court acted in haste and without due regard for the positions of the parties, the applicable law, and its own scheduling order. Applying the standard of review as set forth in Erickson (supra) it is evident that the district court's order must be reversed.

MERITORIOUS DEFENSE

Gary and Betty Losson did have a meritorious defense. 38 U.S.C. §1968 provides appellants with an genuine defense. That statute, along with the court's abuse of discretion clearly allows appellants Rule 60(b) relief.

It is abundantly clear from a plain reading of §1968 that Richard's SGLI insurance ceased 120 days after his release from active duty. He was released from active duty September 30, 1989. One hundred twenty days later, approximately January 29, 1990, his SGLI insurance ceased. Therefore the insurance was terminated and, along with it, all designations of beneficiaries. The district court should have understood that fact, and therefore denied Gwendolyn Klein Losson's motion for summary judgment. Failure to do so was clear and blatant abuse of discretion.

Respondent admits at page 10 that Rule 60(b) motions should be granted liberally, particularly when both the elements of surprise and a meritorious defense exist. In ruling on a motion for summary judgment, the district court must view the evidence and draw all inferences in a light most favorable to the nonmoving party. T.W. Electrical Services, Inc. v. Pacific Electrical Contractors, 809 F.2d 626, 630-31 (9th Cir. 1987). At a minimum, the district court had before it substantive law that, when viewed in a light most favorable to Gary and Betty Losson, would have been grounds for denial of Gwendolyn Klein Losson's motion for summary judgment. That's at a minimum. Rationally, and legally, the district court should have granted summary judgment to Gary and Betty Losson. When the district court was put on notice that Gary and Betty Losson were opposing Gwendolyn's motion for summary judgment, and had their own motion, it should have adhered to its own scheduling order and had a hearing on December 3, 1993 at which time the parties could have argued their respective positions. Had it done so, the district court would have heard evidence that not only had the SGLI policy expired under the plain language of 38 U.S.C. §1968 but also that the policy itself, by its own terms, terminated between the time Richard Losson left active duty and the time he reentered active reserve duty, thereby cancelling the designation of beneficiary.

The district court acted in haste and without due regard for the positions of the parties, the applicable law, and its own scheduling order. Applying the standard of review as set forth in Erickson v. Pierce County, 960 F.2d 801 (9th Cir. 1992) citing Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989) it is evident that the district court's order must be reversed.

INSURANCE POLICY

The insurance policy in question is attached to the Complaint In Interpleader as Exhibit A (E.R. Tab 1). Article 1, Section 3 of that policy addresses the matter of beneficiaries. Paragraph 2 of Section 3 cites the language of 38 C.F.R. §9.16(b) without referring to the citation. However, the policy goes on to add two more conditions under which a designation of beneficiary may terminate: "(4) in the case of a member insured under Full-time Coverage when such insurance terminates (Emphasis added) or (5) . . . if the member becomes insured for Veteran's Group Life Insurance . . ." In this case the insurance terminated therefore the designation of beneficiary terminated. Richard Losson was covered as a full time active duty member of the U.S. Navy at the time he designated Gwendolyn Klein Losson as his beneficiary. He was subsequently discharged from active duty and divorced Gwendolyn. More than 120 days passed and Richard did not continue to pay his SGLI premiums after discharge from active duty. Therefore, the policy terminated and so did, by operation of law, the designation of beneficiary.

Under Section 5 of the policy the insurance terminates when the policy holder ceases to pay the premiums. In this case Richard Losson ceased paying the premiums when he was separated from active duty. Therefore the designation was terminated. Not only is this the plain language of the policy but also common sense. Any person who has had insurance knows that if he stops paying the premiums the insurance will terminate and so will his designation of beneficiary.

The district court had this policy before it from the inception of this matter with the filing of the Complaint In Interpleader. Either from the plain language of the policy or from the plain language of 38 U.S.C. §1968 the district court should have denied Gwendolyn Klein Losson's motion for summary judgment and granted Gary and Betty Losson's motion for summary judgment. There is no explanation or excuse otherwise. The court had before it all that was necessary to reach that conclusion and should have done so.

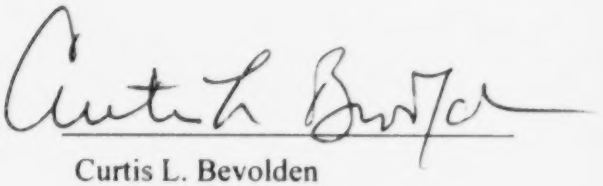
Appellants were caught by surprise when the district court, ignoring its own scheduling order giving the parties until October 15, 1993 to file their respective motions for summary judgment, granted Gwendolyn Klein Losson's motion for summary judgment. Rule 60(b) relief must be granted when the moving party has been taken by surprise and has a meritorious defense. Clearly, both the terms of the policy and the plain language of 38 U.S.C. §1968 provide appellants not only with a meritorious defense but with a solid legal grounds to have their motion for summary judgment granted. The judgment and order of the district court should be reversed and the motion for summary judgment of Betty and Gary Losson, appellants herein, should be granted.

CONCLUSION

For the reasons set forth above and for the reasons that the action of the District Court denied the Petitioners due process under the 5th Amendment to the United States Constitution, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: March 3, 1995.

Respectfully submitted,



Curtis L. Bevolden
Attorney for Petitioners

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRUDENTIAL INSURANCE Plaintiff v. GARY LYNN LOSSON; BETTY JANE LOSSON; Defendants-Appellants v. GWENDOLYN KLEIN LOSSON Defendant-Appellee and BARI LYNNE LOSSON Defendant	) No. 93-36131) D.C. No. CV-92-00190-JFB)))) M E M O R A N D U M*)))))))

Appeal from the United States District Court
for the District of Montana
James F. Battin, Chief Judge Presiding

Submitted January 10, 1995**
Seattle, Washington

Before: ALARCON AND BRUNETTI, Circuit Judges, and KELLEHER,***

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

*** Honorable Robert J. Kelleher, Senior United States District Judge, for the Central District of California, sitting by designation.
Senior District Judge

Prudential Insurance filed this interpleader action for a determination regarding which of several claimants is entitled to the life insurance proceeds of Richard Losson. Gwendolyn Klein Losson filed a motion for summary judgment. When Gary and Betty Losson failed to respond within the time allotted by Local Rules, the district court granted summary judgment to Gwendolyn Klein Losson. We affirm because we conclude that the district court did not abuse its discretion in denying Gary and Betty Losson's motion to set aside the judgment because they failed to demonstrate that they have a meritorious defense.

Gary and Betty Losson contend the district court erred in denying their motion to set aside the judgment because they presented a meritorious defense to what essentially amounted to a default judgment. We review the district court's denial of a Rule 60(b) motion for abuse of discretion. In re Hammer, 940 F.2d 524, 525 (9th Cir. 1991). The district court has the discretion to deny a Rule 60(b) motion to vacate if "(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default." Id. at 525-26. "This tripartite test is disjunctive," and thus a finding that any of these factors is present is sufficient to justify the district court's denial of the Rule 60(b) motion. Id. at 526.

Gary and Betty Losson contend that the life insurance policy in which Richard Losson designated Gwendolyn Klein Losson as sole beneficiary terminated 120 days after he was released from active
duty and transferred to the Naval Reserve. Gary and Betty Losson argue "[t]hat termination voided all designations of beneficiaries," and "[w]hen Richard signed up for the active reserves his coverage was reinstated, no beneficiaries were designated, and therefore, at the time of his death, [we] were entitled to the proceeds of his policy." Before the district court and in their opening brief in this appeal, Gary and Betty Losson cite 38 U.S.C. §1968(a)(1)(A) as support for this contention.[1]

This argument lacks merit. Section 1968 provides that insurance coverage for "any member of the uniformed serves . . . shall continue in effect while the member is on active duty, active duty for training, or inactive duty training . . . , or while the member meets the qualifications set forth in section 1965(5)(B) . . . of this title." 38 U.S.C. § 1968(a). Section 1965 (5)(B) defines "member" to include "a person who volunteers for assignment to the Ready Reserve of a uniformed service." 38 U.S.C. §1965(5)(B).

[1] In their reply brief, Gary and Betty Losson argue that certain provisions of Richard Losson's life insurance policy favor their position. We decline to address this contention, however, because we generally do not review issue raised for the first time in a reply brief. Eberle v. City of Anaheim, 901 F.2d 814, 817-18 (9th Cir. 1990).

The undisputed facts reveal that Richard Losson served in the Navy in one of the above-mentioned capacities at all times relevant to this action. From May 8, 1989, the date upon which Richard Losson designated Gwendolyn Klein Losson as the sole beneficiary of the life insurance proceeds, to September 30, 1989 Richard Losson served on active duty. From September 30, 1989 to November 11, 1990 Richard Losson served in the Naval Reserve. From November 11, 1990 to December 26, 1990 Richard Losson served on inactive duty training in drill pay status. Finally, from December 26, 1990 until March 13, 1991, the date of his death, Richard Losson served on inactive duty training for non-pay status with the Naval Reserve.

Because Richard Losson continually served in the Navy in one of the capacities listed in 38 U.S.C. §1968(a), his life insurance policy never terminated. Moreover, the undisputed facts show that Richard Losson never changed his designation of Gwendolyn Klein Losson as his sole beneficiary. Finally, the designation of Gwendolyn Klein Losson as beneficiary was not canceled automatically by operation of 38 C.F.R. § 916(b) because Richard Losson was never released from all naval duty and did not enter duty in another uniformed service.[2] Gary and Betty Losson have

[2] 38 C.F.R. § 916(b) provides:

> Any designation of beneficiary . . . under Servicemen's Group Life Insurance for full time coverage or part-time coverage will remain in effect, until properly changed by the member or automatically canceled, under the following rules:

failed to present any plausible argument that they are entitled to Richard Losson's life insurance proceeds. The district court did not abuse its discretion by finding Gary and Betty Losson lacked a meritorious defense.

AFFIRMED.

Prudential Insurance filed this interpleader action for a determination regarding which of several claimants is entitled to the life insurance proceeds of Richard Losson. Gwendolyn Klein Losson filed a motion for summary judgment. When Gary and Betty Losson failed to respond within the time allotted by Local Rules, the district court granted summary judgment to Gwendolyn Klein Losson. We affirm because we conclude that the district court did not abuse its discretion in denying Gary and Betty Losson's motion to set aside the judgment because they failed to demonstrate that they have a meritorious defense.

Gary and Betty Losson contend the district court erred in denying their motion to set aside the judgment because they presented a meritorious defense to what essentially amounted to a default judgment. We review the district court's denial of a Rule 60(b) motion for abuse of discretion. In re Hammer, 940 F.2d 524, 525 (9th Cir. 1991). The district court has the discretion to deny a Rule 60(b) motion to vacate if "(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default." Id. at 525-26. "This tripartite test is disjunctive," and thus a finding that any of these factors is present is sufficient to justify the district court's denial of the Rule 60(b) motion. Id. at 526.

Gary and Betty Losson contend that the life insurance policy in which Richard Losson designated Gwendolyn Klein Losson as sole beneficiary terminated 120 days after he was released from active
duty and transferred to the Naval Reserve. Gary and Betty Losson argue "[t]hat termination voided all designations of beneficiaries," and "[w]hen Richard signed up for the active reserves his coverage was reinstated, no beneficiaries were designated, and therefore, at the time of his death, [we] were entitled to the proceeds of his policy." Before the district court and in their opening brief in this appeal, Gary and Betty Losson cite 38 U.S.C. §1968(a)(1)(A) as support for this contention.[1]

This argument lacks merit. Section 1968 provides that insurance coverage for "any member of the uniformed serves . . . shall continue in effect while the member is on active duty, active duty for training, or inactive duty training . . . , or while the member meets the qualifications set forth in section 1965(5)(B) . . . of this title." 38 U.S.C. § 1968(a). Section 1965 (5)(B) defines "member" to include "a person who volunteers for assignment to the Ready Reserve of a uniformed service." 38 U.S.C. §1965(5)(B).

[1] In their reply brief, Gary and Betty Losson argue that certain provisions of Richard Losson's life insurance policy favor their position. We decline to address this contention, however, because we generally do not review issue raised for the first time in a reply brief. Eberle v. City of Anaheim, 901 F.2d 814, 817-18 (9th Cir. 1990).

The undisputed facts reveal that Richard Losson served in the Navy in one of the above-mentioned capacities at all times relevant to this action. From May 8, 1989, the date upon which Richard Losson designated Gwendolyn Klein Losson as the sole beneficiary of the life insurance proceeds, to September 30, 1989 Richard Losson served on active duty. From September 30, 1989 to November 11, 1990 Richard Losson served in the Naval Reserve. From November 11, 1990 to December 26, 1990 Richard Losson served on inactive duty training in drill pay status. Finally, from December 26, 1990 until March 13, 1991, the date of his death, Richard Losson served on inactive duty training for non-pay status with the Naval Reserve.

Because Richard Losson continually served in the Navy in one of the capacities listed in 38 U.S.C. §1968(a), his life insurance policy never terminated. Moreover, the undisputed facts show that Richard Losson never changed his designation of Gwendolyn Klein Losson as his sole beneficiary. Finally, the designation of Gwendolyn Klein Losson as beneficiary was not canceled automatically by operation of 38 C.F.R. § 916(b) because Richard Losson was never released from all naval duty and did not enter duty in another uniformed service.[2] Gary and Betty Losson have

[2] 38 C.F.R. § 916(b) provides:

> Any designation of beneficiary . . . under Servicemen's Group Life Insurance for full time coverage or part-time coverage will remain in effect, until properly changed by the member or automatically canceled, under the following rules:

failed to present any plausible argument that they are entitled to Richard Losson's life insurance proceeds. The district court did not abuse its discretion by finding Gary and Betty Losson lacked a meritorious defense.

AFFIRMED.

(1) If the insurance terminates following separation or release from all duty in a uniformed service.

(2) If the member enters duty in another uniformed service.

(3) If the member reenters on duty in the same uniformed service more than 1 calendar day after separation or release from all duty in that uniformed service.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

THE PRUDENTIAL INSURANCE, COMPANY OF AMERICA, Plaintiff, vs. GARY LYNN LOSSON, BETTY JANE LOSSON, and GWENDOLYN KLEIN LOSSON, Defendants.	)	CV 92-190-BLG-JFB ORDER

On September 27, 1993, this Court granted Summary Judgment in favor of Defendant, Gwendolyn Klein Losson (Gwendolyn), and entered a final Judgment in accordance with that decision. That Order effectively resolved this interpleader action by ruling that Gwendolyn Klein Losson is entitled to the Servicemen's Group Life Insurance (SGLI) proceeds at issue in this case. The Court ruled on Gwendolyn's Motion for Summary Judgment without the benefit of response briefs from any of the defendants.[1] Defendants, Gary

[1] Gwendolyn's Motion for Summary Judgment was served and filed on September 1, 1993, making the response brief due on September 20, 1993. See Local Rule 220-1. The other defendants, (Gary , Betty and Bari) did not respond within the prescribed time period, apparently believing that they thought they had until October 15, 1993 to file motions for summary judgment. This Court did in fact set October 15, 1993 as the cut off date for filing summary judgment motions. However, this Court never altered the Rules of Civil Procedure and Local Rule 220-1 which plainly set out the time frame for responding to motions.

Lynn Losson and Betty Jane Losson, (Gary and Betty),[2] have now filed a Motion to Set Aside the Order Granting Summary Judgment and the final Judgment entered as a result thereof.[3]

A motion to set aside a final judgment is governed by Rule 60 of the Federal Rules of Civil Procedure. Rule 60(b) provides that the Court may relieve a party from a final judgment for reasons including "mistake, inadvertence, surprise, or excusable neglect," or for "any other reason justifying relief from the operation of the judgment." See Fed. R. Civ. Pro. 60(b)(1) & (6). Because "Rule 60(b) is remedial in nature, it must be liberally applied." Direct Mail Specialists v. Eclat Computerized Tech., 840 F.2d 685, 690 (9th Cir. 1988) (citation omitted.). "[W]here defendant seeks timely relief from the judgment and has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment.
Id. However, the Court may deny a Rule 60(b) motion if the moving party does not have a meritorious defense. Id.

In the present case, Gary and Betty do not have a meritorious

[2] Bari Lynn Losson was also a defendant who failed to file a timely response the (sic) Gwendolyn's Motion for Summary Judgment. She was represented by a different attorney. However, she does not join in this motion to set aside the summary judgment.

[3] Local Rule 220-1 requires that "[u]pon serving and filing a motion, or with 5 days thereafter, the moving party shall serve and file a brief." No brief has been filed with this motion. Nevertheless, the Court will deem the motion submitted and rule on its merits.

defense.[4] The facts are undisputed that the decedent, Richard Losson, enlisted in the United States Naval Reserve on March 12, 1985 to serve for a period of eight years. On May 8, 1989, he designated Gwendolyn as the sole beneficiary on his SGLI policy. The regulations governing the SGLI policies provide that the designation of a beneficiary under the policy remains in effect "until properly changed by the member or automatically canceled." 38 C.F.R. § 9.16 (1993).

> The designation of a beneficiary is automatically cancelled:
> (1) if the insurance terminates following separation or release from all duty in a uniformed service.
> (2) If the member enters on duty in another uniformed service.
> (3) If the member reenters on duty in the same uniformed service more than 1 calendar day after separation or release from all duty in that uniformed service.

38 C.F.R. §9.16(b).

Here, the undisputed facts show that Richard Losson was "on duty" in the United States Naval Reserve from the time he designated Gwendolyn as the sole beneficiary under the SGLI policy until he died in 1991. The designation of Gwendolyn as beneficiary therefore remained in effect at the time of Richard Losson's death, since it had not been properly changed and none of the events triggering automatic cancellation had occurred. Thus, Gary and Betty do not have a meritorious defense, because no material issue

[4] In spite of the fact that the case was closed after the Court issued the September 27, 1993 Order, counsel for Gary and Betty filed a response to Gwendolyn's Motion for Summary Judgment. The Court has reviewed and considered that response in ruling on the present motion to Set Aside the Judgment.

law. See California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987). Because the end result would be the same even if the Court granted defendant's motion, the Court finds that the motion is properly denied. Accordingly,

IT IS ORDERED that Defendant Gary Lynn Losson and Betty Jane Losson's Motion to Set Aside the Order Granting Summary Judgment is denied. Judgment was already entered on September 27, 1993.

DATED this 23rd Day of November, 1993.

/s/ SIGNED
James F. Battin
Senior U.S. District Judge

APPENDIX C

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,k or property, without due process of law; nor shall priveste property be taken for public use,k without just compensation.

Supreme Court, U.S.
FILED
MAY 8 1995
OFFICE OF THE CLERK

No. 94-1730

In The

Supreme Court of the United States

October Term, 1994

BETTY AND GARY LOSSON,

Petitioners,

v.

GWENDOLYN KLEIN LOSSON,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Gary Lynn Losson, Petitioner

Betty Jane Losson, Petitioner

Gwendolyn Klein Losson, Respondent

The Prudential Insurance Company of America

Bari Lynn Losson

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In addition to the Ninth Circuit Court of Appeals' decision cited in the Petition at 1, this Court's attention must also be directed to two unreported opinions of the United States District Court for the District of Montana, *The Prudential Insurance Company of America v. Gary Lynn Losson, Betty Jane Losson, Bari Lynn Losson and Gwendolyn Klein Losson*, No. CV 92-190-BLG-JFB (September 27, 1993) and (November 23, 1993).[1]

In the September 27, 1993, order the trial court granted Respondent's motion for summary judgment. In the November 23, 1993, order the trial court denied Petitioners' Rule 60(b) motion to set aside the judgment.

JURISDICTION AND TIMELINESS

Respondent agrees that the Court has jurisdiction of the Petition. Respondent received service of the Petition on April 21, 1995. This response is timely if served by First Class mail on or before May 21, 1995. Sup. Ct. R. 15.2, 29.2, 30.1.

[1] Petitioner's reproduction of the court of appeals' opinion and the district court's opinion dated November 23, 1993, in their appendix is not accurate. For that reason, both decisions, along with the trial court's decision dated September 27, 1993, are reproduced in the Appendix to Brief in Opposition [hereinafter Opp. App.].

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The verbatim text of the Fifth Amendment to the United States Constitution is set forth in Appendix C to the Petition.

The verbatim text of Rule 220-1, Rules of Procedure of the United States District Court for the District of Montana [hereinafter Local Rules] is:

> **220-1 MOTIONS**
>
> Upon serving and filing a motion, or within 5 days thereafter, the moving party shall serve and file a brief. The adverse party shall have 10 days thereafter within which to serve and file an answer brief. A reply brief may be served and filed within 10 days thereafter. Upon the filing of briefs, the motion shall be deemed made and submitted and taken under advisement by the Court, unless the Court orders oral argument on the motion. The Court may, in its discretion, order oral argument on its own motion, or upon an application contained in the brief of either party.
>
> Failure to file briefs within the prescribed time may subject any motion to summary ruling. Failure to file a brief by the moving party shall be deemed an admission that, in the opinion of counsel, the motion is without merit, and, failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.

STATEMENT OF THE CASE

On March 12, 1985, Richard Losson enlisted in the United States Naval Reserve. (R 33, pgs. 1, 2). His enlistment obligated him to "serve in the armed forces for a period of eight years (active and reserve) unless sooner discharged." (R 33, pg. 2). In short, he was obligated to be a member of the Navy (in Reserve status) until March 11, 1993. (R 33, pg. 2).

On May 6, 1989, Richard Losson married Respondent. (R 33, pg. 2). At that time Richard Losson was insured under a Servicemen's Group Life Insurance [hereinafter SGLI] policy issued by The Prudential Insurance Company of America [hereinafter The Prudential]. On May 8, 1989, he executed a SGLI beneficiary designation, naming Respondent as the sole beneficiary. (R 33, pg. 2). The official records compiled by the U.S. Government contain no writing of any nature signed by Richard Losson indicating an intent to change the designation of beneficiary. (R 33, pg. 3).

Richard Losson and Respondent later divorced. (R 1, pg. 2; R 9, pg. 1).

Over time Richard Losson's status in the Navy changed; however, he was never discharged. (R 33, pgs. 2, 3).

Richard Losson died on March 13, 1991, from a gunshot wound inflicted by Bari Lynn Losson. (R 33, pg. 3).

The Prudential filed the present case on November 17, 1992, interpleading the SGLI policy proceeds into court. (R 1). All of the named defendants filed responsive pleadings. (R 6, 8 & 9).

By an order filed April 12, 1993, (R 19) The Prudential was given until April 20, 1993, in which to file a motion for summary judgment. All other motions for summary judgment were to be filed "on or before August 16, 1993" with a hearing set on December 3, 1993. (R 19).

By an order filed on May 11, 1993, The Prudential was discharged as a stakeholder and dismissed with prejudice from the case. (R 24).

An order (R 29) was entered changing the deadline for filing all other motions for summary judgment from August 16, 1993, to October 15, 1993.

On September 1, 1993, Respondent moved for summary judgment in her favor. (R 31). She filed a supporting brief (R 32) and a statement of uncontroverted facts (R 33) as required by Rules 220-1 and 220-4, Local Rules.

None of the other defendants responded to Respondent's motion.

By an order (R 34) filed September 27, 1993, the trial court granted Respondent's motion for summary judgment. Although the trial court noted Petitioners' failure to respond to Respondent's motion (R 34, pg. 1), the court granted the motion for summary judgment only after finding that Petitioner had met the burden imposed on her by Rule 56, Fed. R.Civ.P. (R 34, pg. 2). Pursuant to the trial court's order, a judgment was filed on September 27, 1993. (R 35).

On September 28, 1993, Petitioners filed a motion entitled "Motion to Set Aside Order Granting Summary Judgment" pursuant to Rule 60(b), Fed. R.Civ.P. (R 36). Petitioners failed to file a supporting brief as required by

Local Rule 220-1. However, Petitioners did file the affidavit of their counsel (R 37) wherein he averred that he had not responded to Respondent's motion as required by the Local Rules "because he was relying on the October 15, 1993 date set by this [Trial] Court's order of August 18, 1993. . . . " (R 37, pg. 2). He further averred that he was "surprised that he wasn't given until October 15, 1993 to file his own motion for summary judgment. . . . " (R 37, pg. 2).

On October 1, 1993, Bari Losson, the individual who murdered Richard Losson, disclaimed any interest in the insurance proceeds which had been interplead. (R 38).

Petitioners filed a motion for summary judgment (R 40) seeking judgment in their favor on October 15, 1993, along with a brief both supporting their motion and responding to Respondent's motion. (R 41). In their brief, Petitioners admitted "[t]he facts are undisputed and have been stipulated to by the parties hereto and are a part of the record herein." (R 41, pg. 1).

On November 23, 1993, the trial court issued an order (R 43) denying Petitioners' Rule 60(b) motion to set aside the judgment. After noting that Petitioners had breached Local Rule 220-1 by failing to file a supporting brief (R 43, pg. 2, fn. 3), the trial court deemed the Rule 60(b) motion submitted and ruled on its merits.[2] (R 43, pg. 2, fn. 3). The trial court denied the motion on the grounds that Petitioners did not have a meritorious defense and under the

---

[2] In ruling on the Petitioners' Rule 60(b) motion, the trial court reviewed and considered Lossons' summary judgment brief. (R 43, pg. 3, fn. 4).

undisputed material facts Respondent was entitled to judgment in her favor as a matter of law. (R 43, pgs. 3, 4). The trial court concluded that "[b]ecause the end result would be the same even if the Court granted defendant's motion, the Court finds that the motion is properly denied." (R 43, pg. 4).

In its November 23rd order the district court also addressed Petitioners' contention that they had properly relied on the October 15th motion filing deadline to delay their response to Respondent's motion for summary judgment. The court noted:

> Gwendolyn's [Klein] Motion for Summary Judgment was served and filed on September 1, 1993, making the response brief due on September 20, 1993. *See* Local Rule 220-1. The other defendants, (Gary, Betty and Bari) did not respond within the prescribed time period, apparently believing that they thought they had until October 15, 1993 to file motions for summary judgment. This Court did in fact set October 15, 1993 as the cut-off date for *filing* summary judgment motions. However, this court never altered the Rules of Civil Procedure and Local Rule 220-1 which plainly set out the time for *responding* to motions.

(R 43, pg. 1, fn. 1).

On November 29, 1993, Lossons filed their notice of appeal (R 47) wherein they appealed "from the final orders entered on the 27th day of September and on the 23rd day of November, 1993."

The court of appeals affirmed the trial court's denial of Petitioner's Rule 60(b) motion. (Opp. App. 12a).

SUMMARY OF ARGUMENT

1. This Court should not consider Petitioners' constitutional due process issue because they did not raise a constitutional issue at the trial court or court of appeals level.

2. Petitioners fail to cite *any* authority from *any* source supporting their contention that the failure to hold a hearing on Respondent's motion for summary judgment or the finding that Petitioners did not have a meritorious defense was a violation of their constitutional right to due process. In fact, it appears that there has been no violation of their constitutional right to due process.

3. Even if one accepts Petitioners' contention that their constitutional right to due process was violated, they have not made any showing that the circumstances of this case are such that it requires the attention of this Court.

REASONS FOR DENIAL OF PETITION

I. Until They Filed Their Petition With This Court, Petitioners Had Never Raised A Claim That Their Due Process Rights Had Been Violated.

Petitioners argue that their constitutional right to due process has been violated. (Pet. 6). This claim has never been made before the filing of the Petition.

When Petitioners filed their Rule 60(b) motion at the trial court level, they did not claim that any act on the part of the trial court had violated their constitutional right to due process. Likewise, on appeal to the circuit court, the Petitioners again failed to raise a claim that their constitutional right to due process had been violated.

It is the general rule of this Court not to address issues that were not raised at the appeals court level. See, *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Petitioners have presented no argument that this Court should depart from this rule in the present case.

II. Petitioners Cite No Authority Supporting Their Contention That Their Due Process Rights Have Been Violated.

Petitioners claim that the denial of their Rule 60(b) motion amounted to a denial of their constitutional right to due process because the trial court did not hold a hearing on the summary judgment motion and ignored the provisions of 38 U.S.C. § 1968. (Pet. 6). However, Petitioners failed to cite even one statute, rule, or court decision supporting this claim. In fact, there is not even one mention of "due process" in Petitioners' argument (Pet. 6-11). Their constitutional claim is without merit.

A. Failure to hold a hearing.

Rule 83, Fed.R.Civ.P. allows district courts to set forth local rules governing practice and procedure as long as the rules do not conflict with the Federal Rules. *U.S. v.*

Real Property Located at Incline Village, 47 F.3d 1511, 1519 (9th Cir. 1995). Given the interrelationship between Rule 56, Fed.R.Civ.P. and Rule 83, Fed.R.Civ.P., local rules such as Local Rule 220-1 have been consistently held valid in the Ninth Circuit as long as they do not remove the district court's discretion as to whether to grant a motion. *Id.* at 1519; *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993), and *United States v. Warren*, 601 F.2d 471, 473 (9th Cir. 1979). Local Rule 220-1 provides that failure to file an opposition brief shall be deemed an admission that the motion is well taken, but the trial court retains the discretion as to whether to grant the motion. Thus, it appears that Local Rule 220-1 is clearly valid.

In the present case, the trial court's grant of summary judgment against the Petitioners was proper if the Respondent's motion satisfied Rule 56, Fed.R.Civ.P. The trial court considered the requirements of Rule 56, Fed.R.Civ.P. and concluded that the Respondent's motion did meet them. (Opp. App. 2a). It was on that basis that Respondent's motion was granted. (Opp. App. 3a).

In light of the trial court's specific finding that the Respondent's motion satisfied Rule 56, Fed.R.Civ.P., it was not a violation of due process for the trial court to grant the motion for summary judgment without holding a hearing. There was no reason to have a hearing where the Petitioners failed to demonstrate that there was any issue which could be affected by a hearing. "The Constitution does not require such futile exercises." *Knighten v. C.I.R.*, 702 F.2d 59, 61 (5th Cir. 1983). See also, *LaBoy v. Zuley*, 749 F.Supp. 184, 185 (N.D. Ill. 1990) (holding there is no constitutional right under the Fifth Amendment to

the United States Constitution to oral argument on a motion to dismiss.)

B. Application of a statute to the facts.

Petitioners assert (Pet. 6) that it was a denial of due process for the trial court and the court of appeals to disagree with their interpretation of the applicability of 38 U.S.C. § 1968. This assertion has no merit at all.

Both the trial court (Opp. App. 6a, 7a) and the court of appeals (Opp. App. 10a, 11a) considered Petitioners' argument that under this statute they were entitled to receive the proceeds of the SGLI policy. Both courts disagreed with the Petitioners' argument. Respondent is at a loss to understand how this constitutes a violation of Petitioners' right to due process.

III. Petitioners Have Failed To Show That The Present Case Is Of Such Significance As to Justify Consideration By This Court.

A petition for a writ of certiorari is granted only when there are special and important reasons for doing so. Sup. Ct. R. 10. Petitioners have not established or even argued that the present matter is important to anyone but themselves. There is no claim that there is a conflict among the various courts of appeals. There is no claim that this case involves an important question of federal law which needs to be settled by this Court. The simple truth is that Petitioners refuse to accept the Ninth Circuit

Court of Appeals' finding that their "argument lacks merit". (Opp. App. 10a).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE PRUDENTIAL INSURANCE, COMPANY OF AMERICA, Plaintiff,	)	CV 92-190-BLG-JFB
vs.	)	ORDER
GARY LYNN LOSSON, BETTY JANE LOSSON, BARI LYNNE LOSSON and GWENDOLYN KLEIN LOSSON, Defendants.	)	(Filed Sep. 27, 1993)

Defendant, Gwendolyn Klein Losson, filed a motion for summary judgment in this interpleader action on September 1, 1993. The motion was accompanied by a supporting brief and statement of undisputed facts, in accordance with Local Rules 220-1 and 220-4 of this Court. *See* Rules 220-1 and 220-4, Rules of Procedure of the United States District Court for the District of Montana. No response has been filed by the opposing parties within the ten day time period prescribed by Local Rule 220-1. "Failure to file briefs within the prescribed time may subject any motion to summary ruling . . . and, failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken." Local Rule 220-1.

Summary judgment is properly granted under Rule 56(c) if "the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *California Architectural Building Products, Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987). In ruling on a motion for summary judgment, the Court must view the evidence and draw all inferences in a light most favorable to the nonmoving party. *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors*, 809 F.2d 626, 630-31 (9th Cir. 1987). The moving party must initially present to the Court the basis for its motion, and must demonstrate the absence of any dispute over material facts that would preclude summary judgment. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to show that specific facts remain at issue, requiring their submission to a jury. *Kaiser Cement Corp. v. Fischbach & Moore*, 793 F.2d 1100, 1103-04 (9th Cir. 1986).

The Court has considered Defendant's motion in light of these standards, and finds that Defendant has met her burden as a movant for summary judgment. 38 U.S.C. § 1970(a) sets forth clear standards governing payment of a claim under the Servicemen's Group Life Insurance policy (SGLI). 38 C.F.R. § 9.16(b) governs how a beneficiary may be changed under the policy. Applying these relevant code sections to the undisputed facts in this case clearly indicates that Defendant is entitled to the life insurance proceeds. Defendant, Gwendolyn Losson, was the designated beneficiary of the SGLI policy at the time Richard Losson, the holder of the policy, was killed. Richard Losson had been continually enlisted in the

United States Naval Reserve from the time he designated Defendant as beneficiary until the time of his death. Based on that finding, and upon the provisions of the Local Rules of this Court set forth above,

IT IS ORDERED that Defendant Gwendolyn Klein Losson's motion for summary judgment is granted. The Clerk is directed to enter Judgment accordingly.

DATED this 27th Day of September, 1993.

/s/ James F. Battin
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE PRUDENTIAL INSURANCE, COMPANY OF AMERICA, Plaintiff,	)	CV 92-190-BLG-JFB
vs.	)	ORDER
GARY LYNN LOSSON, BETTY JANE LOSSON, BARI LYNNE LOSSON and GWENDOLYN KLEIN LOSSON, Defendants.	)	(Filed Nov. 23, 1993)

On September 27, 1993, this Court granted Summary Judgment in favor of Defendant, Gwendolyn Klein Losson (Gwendolyn), and entered a final Judgment in accordance with that decision. That Order effectively resolved this interpleader action by ruling that Gwendolyn Klein Losson is entitled to the Servicemen's Group Life Insurance (SGLI) proceeds at issue in this case. The Court ruled on Gwendolyn's Motion for Summary Judgment without the benefit of response briefs from any of the defendants.[1] Defendants, Gary Lynn Losson and Betty

[1] Gwendolyn's Motion for Summary Judgment was served and filed on September 1, 1993, making the response brief due on September 20, 1993. *See* Local Rule 220-1. The other defendants, (Gary, Betty and Bari) did not respond within the

Jane Losson, (Gary and Betty),[2] have now filed a Motion to Set Aside the Order Granting Summary Judgment and the final Judgment entered as a result thereof.[3]

A motion to set aside a final judgment is governed by Rule 60 of the Federal Rules of Civil Procedure. Rule 60(b) provides that the Court may relieve a party from a final judgment for reasons including "mistake, inadvertence, surprise, or excusable neglect," or for "any other reason justifying relief from the operation of the judgment." *See* Fed. R. Civ. Pro. 60(b)(1) & (6). Because "Rule 60(b) is remedial in nature, it must be liberally applied." *Direct Mail Specialists v. Eclat Computerized Tech.*, 840 F.2d 685, 690 (9th Cir. 1988) (citation omitted). "[W]here defendant seeks timely relief from the judgment and has a meritorious defense, doubt, if any, should be resolved in

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prescribed time period, apparently believing that they thought they had until October 15, 1993 to file motions for summary judgment. This Court did in fact set October 15, 1993 as the cut-off date for *filing* summary judgment motions. However, this Court never altered the Rules of Civil Procedure and Local Rule 220-1 which plainly set out the time frame for *responding* to motions.

[2] Bari Lynn Losson was also a defendant who failed to file a timely response the Gwendolyn's Motion for Summary Judgment. She was represented by a different attorney. However, she does not join in this motion to set aside the summary judgment.

[3] Local Rule 220-1 requires that "[u]pon serving and filing a motion, or within 5 days thereafter, the moving party shall serve and file a brief." No brief has been filed with this motion. Nevertheless, the Court will deem the motion submitted and rule on its merits.

favor of the motion to set aside the judgment. *Id.* However, the Court may deny a Rule 60(b) motion if the moving party does not have a meritorious defense. *Id.*

In the present case, Gary and Betty do not have a meritorious defense.[4] The facts are undisputed that the decedent, Richard Losson, enlisted in the United States Naval Reserve on March 12, 1985 to serve for a period of eight years. On May 8, 1989, he designated Gwendolyn as the sole beneficiary on his SGLI policy. The regulations governing the SGLI policies provide that the designation of a beneficiary under the policy remains in effect "until properly changed by the member or automatically canceled." 38 C.F.R. § 9.16 (1993).

The designation of a beneficiary is automatically cancelled:

> (1) If the insurance terminates following separation or release from all duty in a uniformed service.
>
> (2) If the member enters on duty in another uniformed service.
>
> (3) If the member reenters on duty in the same uniformed service more than 1 calendar day after separation or release from all duty in that uniformed service.

38 C.F.R. § 9.16(b).

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[4] In spite of the fact that the case was closed after the Court issued the September 27, 1993 Order, counsel for Gary and Betty filed a response to Gwendolyn's Motion for Summary Judgment. The Court has reviewed and considered that response in ruling on the present Motion to Set Aside the Judgment.

Here, the undisputed facts show that Richard Losson was "on duty" in the United States Naval Reserve from the time he designated Gwendolyn as the sole beneficiary under the SGLI policy until he died in 1991. The designation of Gwendolyn as beneficiary therefore remained in effect at the time of Richard Losson's death, since it had not been properly changed and none of the events triggering automatic cancellation had occurred. Thus, Gary and Betty do not have a meritorious defense, because no material issue of fact exists and Gwendolyn is entitled to judgment as a matter of law. *See California Architectural Bldg. Products, Inc. v. Franciscan Ceramics,* 818 F.2d 1466, 1468 (9th Cir. 1987). Because the end result would be the same even if the Court granted defendant's motion, the Court finds that the motion is properly denied. Accordingly,

IT IS ORDERED that Defendant Gary Lynn Losson and Betty Jane Losson's Motion to Set Aside the Order Granting Summary Judgment is denied. Judgment was already entered on September 27, 1993.

DATED this 23rd Day of November, 1993.

/s/ James F. Battin
James F. Battin
Senior U.S. District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PRUDENTIAL INSURANCE Plaintiff v. GARY LYNN LOSSON; BETTY JANE LOSSON; Defendants-Appellants v. GWENDOLYN KLEIN LOSSON Defendant-Appellee and BARI LYNNE LOSSON Defendant	No. 93-36131 D.C. No. CV-92-00190-JFB **MEMORANDUM*** (Filed Jan. 13, 1995)

Appeal from the United States District Court
for the District of Montana
James F. Battin, Chief Judge, Presiding

Submitted January 10, 1995**
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

Before: ALARCÓN and BRUNETTI, Circuit Judges, and KELLEHER,*** Senior District Judge

Prudential Insurance filed this interpleader action for a determination regarding which of several claimants is entitled to the life insurance proceeds of Richard Losson. Gwendolyn Klein Losson filed a motion for summary judgment. When Gary and Betty Losson failed to respond within the time allotted by Local Rules, the district court granted summary judgment to Gwendolyn Klein Losson. We affirm because we conclude that the district court did not abuse its discretion in denying Gary and Betty Losson's motion to set aside the judgment because they failed to demonstrate that they have a meritorious defense.

Gary and Betty Losson contend the district court erred in denying their motion to set aside the judgment because they presented a meritorious defense to what essentially amounted to a default judgment. We review the district court's denial of a Rule 60(b) motion for abuse of discretion. *In re Hammer*, 940 F.2d 524, 525 (9th Cir. 1991). The district court has the discretion to deny a Rule 60(b) motion to vacate if "(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default." *Id.* at 525-26. "This tripartite test is disjunctive," and thus a finding that any of these

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*** Honorable Robert J. Kelleher, Senior United States District Judge, for the Central District of California, sitting by designation.

factors is present is sufficient to justify the district court's denial of the Rule 60(b) motion. *Id.* at 526.

Gary and Betty Losson contend that the life insurance policy in which Richard Losson designated Gwendolyn Klein Losson as sole beneficiary terminated 120 days after he was released from active duty and transferred to the Naval Reserve. Gary and Betty Losson argue "[t]hat termination voided all designations of beneficiaries," and "[w]hen Richard signed up for the active reserves his coverage was reinstated, no beneficiaries were designated, and therefore, at the time of his death, [we] were entitled to the proceeds of his policy." Before the district court and in their opening brief in this appeal, Gary and Betty Losson cite 38 U.S.C. § 1968(a)(1)(A) as support for this contention.[1]

This argument lacks merit. Section 1968 provides that insurance coverage for "any member of the uniformed services . . . shall continue in effect while the member is on active duty, active duty for training, or inactive duty training . . . , or while the member meets the qualifications set forth in section 1965(5)(B) . . . of this title." 38 U.S.C. § 1968(a). Section 1965(5)(B) defines "member" to include "a person who volunteers for assignment to the Ready Reserve of a uniformed service." 38 U.S.C. § 1965(5)(B).

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[1] In their reply brief, Gary and Betty Losson argue that certain provisions of Richard Losson's life insurance policy favor their position. We decline to address this contention, however, because we generally do not review issues raised for the first time in a reply brief. *Eberle v. City of Anaheim*, 901 F.2d 814, 817-18 (9th Cir. 1990).

The undisputed facts reveal that Richard Losson served in the Navy in one of the above-mentioned capacities at all times relevant to this action. From May 8, 1989, the date upon which Richard Losson designated Gwendolyn Klein Losson as the sole beneficiary of the life insurance proceeds, to September 30, 1989 Richard Losson served on active duty. From September 30, 1989 to November 11, 1990 Richard Losson served in the Naval Reserve. From November 11, 1990 to December 26, 1990 Richard Losson served on inactive duty training in drill pay status. Finally, from December 26, 1990 until March 13, 1991, the date of his death, Richard Losson served on inactive duty training for non-pay status with the Naval Reserve.

Because Richard Losson continually served in the Navy in one of the capacities listed in 38 U.S.C. § 1968(a), his life insurance policy never terminated. Moreover, the undisputed facts show that Richard Losson never changed his designation of Gwendolyn Klein Losson as his sole beneficiary. Finally, the designation of Gwendolyn Klein Losson as beneficiary was not canceled automatically by operation of 38 C.F.R. § 916(b) because Richard Losson was never released from all naval duty and did not enter duty in another uniformed service.[2]

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[2] 38 C.F.R. § 916(b) provides:

> Any designation of beneficiary . . . under Servicemen's Group Life Insurance for full time coverage or part-time coverage will remain in effect, until properly changed by the member or automatically canceled, under the following rules:
>
> (1) If the insurance terminates following separation or release from all duty in a uniformed service.

Gary and Betty Losson have failed to present any plausible argument that they are entitled to Richard Losson's life insurance proceeds. The district court did not abuse its discretion by finding Gary and Betty Losson lacked a meritorious defense.

AFFIRMED.

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(2) If the member enters duty in another uniformed service.

(3) If the member reenters on duty in the same uniformed service more than 1 calendar day after separation or release from all duty in that uniformed service.